BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ISAAC GONZALES	)	
Claimant	)	
	)	
VS.	)	
	)	
UNITED FARMS, INC.	)	
WARD NAIRN	)	
BI-STATE FARMS	)	
Respondents	)	Docket No. 1,019,086
	)	
AND	)	
	)	
WESTERN AGRICULTURAL INS. CO.	)	
Insurance Carrier	)	

ORDER

The insurance carrier Western Agricultural Insurance Company (Western) requests review of the June 22, 2006 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) denied Western's request to be dismissed from this litigation reasoning that, based upon an earlier Board decision,[1] the purchase of insurance brought the respondent, and therefore Western, within the provisions of the Kansas Workers Compensation Act (Act), despite the fact that respondent failed to file the necessary election form.[2]

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[1] *Schneider v. Paul Hensleigh*, No. 170,986, 1994 WL 749207 (Kan. WCAB Feb. 18, 1994).

[2] ALJ Order (June 22, 2006).

Western requests review of the denial of its motion to dismiss asserting that the ALJ ignored subsequent Kansas Supreme Court precedent in *Rivera.*[3] Western contends that *Rivera* enunciates "black letter law"[4] that a written election must be filed with the Director's office before the Act becomes applicable.[5] The mere fact that a respondent purchases workers compensation insurance does not, standing alone, give rise to an application of the Act. Accordingly, Western maintains the ALJ erred in denying its request to be dismissed from this litigation.[6]

Claimant argues that Western's argument is a misinterpretation and misapplication of *Rivera.* Claimant was an employee for various agricultural companies who were all owned and/or operated by Ward Nairn. Mr. Nairn purchased workers compensation coverage for Bi-State Farms and that policy was in effect at the time of claimant's injury. However, no statutorily required election had been filed with the Division. Claimant argues that the existence of a valid policy of insurance at the time of the accident is a crucial distinguishing factor from the rule enunciated in *Rivera*. And that the existence of a valid policy of insurance constitutes substantial compliance with the statute thus giving rise to coverage of the Act. Claimant also suggests that Western should be estopped from denying coverage under the Act.[7]

Bi-State Farms, Western's insured, suggests claimant was, at the time of his injury, properly an employee of United Farms, another agricultural entity owned and/or operated by Ward Nairn. However, at the preliminary hearing, counsel for Bi-State Farms indicated he was "not bringing that issue before the Court as to whether or not he qualifies as a statutory employer [sic] for this purpose for this hearing because it deals only with the coverage issue."[8]

Ward Nairn and United Farms, Inc. (United Farms) contend this matter was not properly before the ALJ because no benefit is being sought. Rather, Western is attempting

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[3] *Rivera v. Cimarron Dairy*, 267 Kan. 865, 988 P.2d 235 (1999).

[4] Western's Brief to the Board at 2 (filed July 19, 2006); see also P.H. Trans. at 9.

[5] *Rivera*, supra at 874.

[6] Under the facts of this case, had this dismissal been granted, claimant's claim would effectively be concluded. Each of the purported respondents are involved in agricultural pursuits and are, therefore, exempt from coverage under the Act. K.S.A. 44-505(a)(1). As explained more fully hereinafter, one respondent, Bi-State Farms, had workers compensation coverage through Western at the time of claimant's injury.

[7] To be clear, the term "coverage" as used herein refers to coverage of the Act, not coverage under an insurance policy. There is no dispute as between these litigants that coverage is available to Bi-State Farms under the policy written and provided by Western.

[8] P.H. Trans. at 32.

to use the preliminary hearing process to, in effect, seek summary judgment in the hopes of avoiding liability. And such procedure is not one of the proper methods of terminating a case.[9] Accordingly, this matter should be remanded to the ALJ for a full hearing particularly given the fact that claimant is at maximum medical improvement.[10]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law.

The facts and circumstances surrounding claimant's injury are not in dispute, nor are they particularly complicated. Claimant is admittedly a farm laborer. He is directly employed by United Farms, but because Ward Nairn owns other agricultural entities, he often assigns claimant to work for his other business interests, including Bi-State Farms. Claimant is paid by United Farms and receives health insurance through a policy paid for by United Farms. Claimant is, however, provided a vehicle to drive as well as a home to live in, both at the expense of Bi-State Farms. There is no accounting mechanism whereby United Farms reimburses Bi-State Farms for these expenses.

On the day of his accident, claimant had been performing work at a United Farms property and was on his way to another property operated by Bi-State Farms when he was severely injured in a motor vehicle accident. Travel was an inherent part of claimant's job. Accordingly, if the Act applies the compensability of this accident is not otherwise in dispute.[11]

When claimant asserted this workers compensation claim, it came to light that only Bi-State Farms had workers compensation coverage under a policy issued by Western. United Farms did not have workers compensation coverage on the date of claimant's accident, although it is undisputed that Ward Nairn always intended for United Farms and Bi-State Farms to have such coverage. Despite the acquisition of this policy of insurance for Bi-State Farms, no written election was filed with the Division of Workers Compensation as required by K.S.A. 44-542a.[12] It was only after claimant's accident that Ward Nairn and

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[9] K.A.R. 51-3-1.

[10] P.H. Trans. at 36-39.

[11] *Gonzales v. Home Healthcare Connection*, No. 1,027,600, 2006 WL 2328113 (Kan. WCAB July 31, 2006).

[12] Two days after claimant's injury, workers compensation coverage was obtained for United Farms and written elections to have its employees to be covered by the Act were filed with the Division as required by statute.

his business partners properly signed and filed elections to come within the Act and in the case of United Farms, arranged for workers compensation insurance.

When faced with this claim, Western requested that claimant dismiss it from this claim asserting that without the written election to come within the Act, there was no authority to maintain any claim against Western. In support of its position Western relies solely upon the Kansas Supreme Court's ruling in *Rivera*.[13] According to Western -

> The black letter law of the State of Kansas is clear that Bi-State Farms in the absence of filing an Election form with the Division, to come under the Act, does not come under the Act by the simple act of purchasing workers compensation insurance. The purchase of a policy of insurance does not constitute substantial compliance with, or act as a substitute for, the requirement to file an Election with the Division. At the time of [c]laimant's accident, Bi-State Farms was an unelected agricultural pursuit, and it was not subject to the Act.[14]

As an agricultural pursuit, a fact which none of the respondents dispute, both United Farms and Bi-State Farms are statutorily exempt from the rights and obligations under the Act unless they take certain steps to invoke coverage under the Act.[15] K.S.A. 44-505 provides for two ways for an exempt agricultural pursuit to effectuate this choice.

> (b) Each employer who employs employees in employments which are excepted from the provisions of the workers compensation act as provided in subsection (a) of this section, shall be entitled to come within the provisions of such act by: (1) Becoming a member in and by maintaining a membership in a qualified group-funded workers' compensation pool. . . or (2) filing with the director a written statement of election to accept thereunder.[16]

That same statute goes on to state that "[s]uch written statement of election shall be effective from the date of filing until such time as the employer files a written statement withdrawing such election with the director."[17]

Given this statutory framework, the import of Western's request is clear. Unless certain steps were taken, neither United Farms or Bi-State Farms are subject to the obligations under the Act. Claimant would be entitled to no workers compensation benefits

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[13] *Rivera v. Cimarron Dairy*, 267 Kan. 865, 988 P.2d 235 (1999).

[14] Claimant's Submission Brief at 4 (filed June 19, 2006).

[15] K.S.A. 44-505(a)(1).

[16] K.S.A. 44-505(b).

[17] *Id.*

for his otherwise compensable injury regardless of whether he is considered an employee of United Farms, Bi-State Farms or both. Based upon the evidence developed in this case thus far, United Farms neither had insurance, filed any election, nor is a member of a group-funded pool. Setting aside claimant's estoppel argument for the moment, there is no basis for an award against United Farms.

Similarly, Bi-State is not a member of a group-funded pool. So, based upon the statutory provisions of K.S.A. 44-505, in order for there to be coverage under the Act for claimant's accident, claimant must establish that his employer filed an election, unless the fact that Bi-State Farms was insured somehow constitutes substantial compliance with K.S.A. 44-505. This is the crucial question at the heart of this appeal.

Before the Board can consider the pending issue, we must first determine whether we have jurisdiction to consider this matter. Although this pending dispute was brought before the ALJ in the preliminary hearing forum, in essence what Western seeks is a dismissal from this claim based upon its contention that the Act does not apply. Claimant is not seeking any preliminary hearing benefits. Indeed, it appears claimant is at maximum medical improvement. Thus, the Board concludes the ALJ's Order is not a preliminary award but rather, is an Order denying a motion to dismiss.

K.S.A. 2003 Supp. 44-551(b)(1) grants the Board jurisdiction to review -

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The limitation to "final" orders was not in the original 1993 version of K.S.A. 44-551. That term was added in 1997 after the Kansas Court of Appeals ruled that the Board's jurisdiction included the right to review such orders as an appointment of a neutral physician and held that the Board's jurisdiction was not limited to review of final orders or awards.[18] The term "final" is, of course, defined as it relates to review by the Kansas Court of Appeals and this is a logical source for a definition.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Kansas Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. In *Skahan*,[19] the Court of Appeals has enunciated three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively

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[18] *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

[19] *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.

In the Board's view, the current Order does not satisfy the *Skahan* criteria. Although Western stridently maintains the *Rivera* case conclusively resolves its liability in this matter, the Board disagrees. First, the procedural and factual background of *Rivera* arguably make it distinguishable from the instant action. Here, there is a valid policy of insurance available to Bi-State[20] unlike in *Rivera*, where the policy had lapsed. The Board has ruled in the past, albeit before *Rivera*, that the existence of a valid insurance policy, even without a written election, evidences a clear intent to come under the provisions of the Act.[21] So, from this perspective, the Board believes the ALJ's Order was legally correct.

But independent of that finding, claimant has asserted an estoppel argument that could well limit the application of *Rivera*. Generally, the doctrine of equitable estoppel is applicable in workers compensation proceedings.[22] Mr. Nairn has testified that he always intended to have workers compensation coverage and it is wholly unclear why the coverage was purchased for one of his farming entities and not for another, claimant's purported direct employer. And the evidence as to why the elections were not filed is largely unexplored. Thus, even if *Rivera* led to the conclusion that Western had no responsibility, the acts of the insurance agent may well give rise to coverage under the Act for Bi-State and potentially United Farms. Moreover, there is a "shared employee" issue that as of yet, has not been litigated by the parties. Even Mr. Nairn conceded "[a]ll the farms intermingle. I can't keep them straight."[23] In sum, independent of the *Rivera* case, there are arguments being made that must be addressed and by dismissing Western, those arguments still remain to be decided and could well impact Western and its policy of insurance.

Because the ALJ's Order is not, under *Skahan*, considered final and is therefore interlocutory in nature, Western's appeal is premature and the Board has no jurisdiction to consider this matter. Accordingly, Western's appeal should be dismissed.

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[20] The policy of insurance is not in evidence and the Board can only assume, based upon Western's arguments, that the policy is valid and in effect, albeit without the benefit of an election, at least as of the time of claimant's injury.

[21] *Schneider v. Paul Hensleigh*, No. 170,986, 1994 WL 749207 (Kan. WCAB Feb. 18, 1994).

[22] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[23] Nairn Depo. at 86.

WHEREFORE, it is the finding, decision and order of the Board that Western Agriculture Insurance Company's appeal of the Order of Administrative Law Judge Pamela J. Fuller dated June 22, 2006, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent Bi-State Farms
Kim R. Martens, Attorney for Western Agricultural Insurance Company
Shirla McQueen, Attorney for Ward Nairn and United Farms Inc.